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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 423

LEVERING & GARRIGUES COMPANY, *et als.*,
Petitioners,

against

PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FRANK P. WALSH,
Attorney for Respondents.

Of Counsel:
JOHN WALSH,
HAROLD STERN.

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PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Counsel for the petitioners rely upon two grounds for granting of the writ of certiorari:

FIRST: That the Circuit Court of Appeals erred in holding that averments with respect to citizenship of voluntary labor associations were insufficient in that jurisdiction based upon diversity of citizenship over voluntary labor

associations depends upon the individual citizenship-residence of their members.

SECOND: That the Circuit Court of Appeals erred in holding that the mere assertion of claim for relief upon a Federal ground, which had been determined adversely, did not give jurisdiction to the District Court in the instant case to pass upon separate and independent questions of which it would have no jurisdiction, except for the claim based on Federal constitution or statute.

Statement of Facts.

The factual statement of the case contained in the petition for the writ of certiorari (paragraphs 1 to 7, pp. 1 to 8) is substantially correct and adopted by respondents herein for the purposes of their argument.

The interpretation and construction placed upon those cases cited in that part of the petition adopted as the petitioners' statement of the case, is denied.

ARGUMENT.

A.

The jurisdictional averment in petitioners' bill of complaint with respect to the association-respondents herein, is not an allegation sufficient to establish the requisite diversity of citizenship to confer jurisdiction on the Federal Court.

The diversity of citizenship clause, which claims jurisdiction in the instant case, requires that the plaintiffs and the defendants must be citizens and residents of different

states; therefore, the jurisdiction of the District Court over the association-respondents herein, depends on the fact whether or not they are citizens of New York and Missouri within the meaning of the term.

It has been repeatedly held in a long line of cases that an unincorporated society, company or association, has no corporate entity and cannot be sued as such but that for jurisdictional purposes its citizenship is dependent upon its members and unless it is affirmatively alleged or shown that the citizenship of each member is different from that of each plaintiff jurisdiction will not lie.

Great Southern Fire Proof Hotel Co. v. *Jones,* 177 U. S. 449, 20 S. Ct. 690; 44 L. Ed. 84;

Thomas v. *Ohio State University,* 195 U. S. 207, 25 S. Ct. 24, 49 L. Ed. 160;

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Brown v. *Protestant-Episcopal Church* (D. C.) 8 Fed. (2nd ed.) 149, 150;

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Irving et al. v. *Joint District Council of New York and Vicinity of United Brotherhood of Carpenters and Joiners of America and Amalgamated Society of America and Joiners of America, et al.,* 180 Fed. 896, 898;

Russell v. *Central Labor Union,* 1 Fed. (2nd ed.) 412;

Beavers v. *McMillan, et al.,* 44 Fed. Rep. (2nd ed.) 668.

Unincorporated societies, companies and associations not having the status of citizenship, those seeking redress against them for alleged violation of general, local or state laws, cannot invoke the jurisdiction of the Federal Courts, by way of diversity of citizenship by suing in their names or through their officers.

The association-respondents herein being voluntary labor associations and not having any corporate entity, as such, the Circuit Court of Appeals properly denied jurisdiction of them under the diversity of citizenship clause.

I.

The reasoning of the petitioners herein that under Federal Law voluntary labor associations are to be considered residents of the state in which they have their recognized headquarters, irrespective of the residence of their members, is without force and should not be considered.

This contention is predicated upon the reasoning contained in those cases out of which flowed the presumptive citizenship of corporators or stockholders of a corporation.

There is no place of residence or citizenship that can be legally ascribed to a voluntary labor association in order to presume the citizenship of their members for the purposes of federal jurisdiction, in the absence of statutory or constitutional provision; nor can citizenship be inferred from the fact in the instant case that the respondent-associations, the International Association and the three local associations had their headquarters at St. Louis, Missouri, and New York City, respectively.

A corporation's citizenship is determined not by where it has its principal office but by the fact of its incorporation in a particular state. The Federal presumption that the citizenship of the corporators or stockholders of a corporation is presumed to be that of the corporation, is not determinative of the contention made here. The rule or presumption attaches to an actual legal entity created and brought into legal existence by the laws of a particular state, as such, which is the fundamental factor in determining Federal jurisdiction on account of diversity of citizenship involving corporations.

If the presumption is to be indulged in here, where is the citizenship of the association, for the presumption follows citizenship, and not residence.

As the Circuit Court of Appeals aptly pointed out, the decision rendered in *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 60 L. Ed. 975, at page 984, is in nowise applicable to the issue raised herein.

In the Coronado case the Court was called upon to determine the violation of Federal Laws, namely, the Anti-Trust Laws, and held that the provision contained therein permitting associations to be sued in their own name or through their officers included voluntary labor associations. That the departure, if it could be called such, was merely procedural and did not enlarge the jurisdiction of the Federal Courts to hear matters arising under general laws or local statutes where its jurisdiction was invoked by way of diversity of citizenship.

There is nothing at variance with the logic or justice of the Circuit Court of Appeals' ruling in the instant case and this Court in the Coronado case. Convenience, justice and even necessity in matters procedural could re-

quire the necessity for a statute permitting these labor associations to be sued in their name, where the jurisdiction of the Federal Courts flows directly from the violation of a Federal right; but until by statutory or constitutional provision the status of these voluntary labor associations is changed, the Federal Courts are without jurisdiction over them;

Thomas v. *Board of Trustees,* 195 U. S. 207,

unless it affirmatively appears in the pleadings or from facts clearly proven that the citizenship and residence of all the members of a voluntary labor association is different from that of the citizenship and residence of all the plaintiffs.

Keeping in mind that the Federal presumption or rule with respect to the citizenship of stockholders or corporators of a corporation attaches to the legal status of a corporation, created as such by a specific state, and that no such status can be ascribed to a voluntary labor association, then the numerous cases cited by petitioner tracing the history and origination of the rule, becomes a mere treatise on the subject and in nowise definitive of the issue presented.

II.

Procedural defects in determining jurisdiction may be waived, but inherent defects never.

Your petitioners contend that because the allegations of the bill, with reference to the citizenship and residence of the respondent-associations, not having been denied by the answer and the jurisdiction being acquiesced in by respondents throughout the case, that the Circuit Court of Appeals, in effect, is estopped from denying jurisdiction on the questions of diversity of citizenship.

They cite, to support their contention, *Thronateeska Pecan Co.* v. *Mathews,* Circuit Court of Appeals, Fifth Circuit, 277 Fed. 361, at page 365, and Equity Rule No. 30.

Equity Rule No. 30, of course, is bottomed on the presumption that the defendant is capable of being sued.

The Thronateeska case is not applicable to the present situation. Mathews, the defendant, was a natural person, capable of citizenship and residence, and if the allegation with reference to the same in the bill of complaint was not properly denied, then Equity Rule No. 30 applies and the allegation stands confessed.

Petitioners overlooked the distinction herein that the defect in the jurisdiction is inherent and not procedural and can never be waived. Jurisdiction cannot be conferred by consent or the failure of the parties to raise the question in the trial court.

Minn. vs. *Northern Sec. Co.,* 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870;

Great Southern Hotel Co. vs. *Jones,* 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842.

III.

The contention that because voluntary labor associations can be sued in the States of New York and Missouri they should be treated as legal entities for purposes of Federal jurisdiction, is erroneous.

The citizenship of a voluntary association cannot be said to be in those states, which by statute, permit the bringing of suits by or against an association in its name or the name of its officers, for the reason that the citizenship of all the respondent-associations herein would be co-extensive with every state that permits the practice.

If petitioners' contention is correct, the citizenship of the International Association might well be ascribed to be that of the State of New York because the International Association, under the laws of the State of New York, which are purely procedural, permits it to sue or be sued; and this is likewise true if the local respondent associations sought redress in the Courts of Missouri. They would be recognized there for that purpose alone, but because of that their citizenship could not be ascribed to the State of Missouri.

The cases cited by petitioner under their Point III, has no application here; rather they tend to prove the contention of respondents that, in the absence of statutory or constitutional provision, voluntary labor associations cannot be sued on diversity of citizenship in their names or by their officers.

Petitioners cite *U. S.* v. *Adams Express Co.*, 229 U. S. 381; 57 L. Ed. 1237, as a case sustaining their contention. The jurisdiction of the Court over the Adams Express Co.

case, a joint stock association, was on account of the violation of a statute, which gave jurisdiction over express companies for a violation of its provisions.

The jurisdiction invoked in *Duplex Printing Co.* v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, cited by petitioners involved a violation of the Anti-Trust Act, which permits the suing of voluntary labor associations in their name and through their officers and involving a Federal right; diversity of citizenship was not in question.

B.

The mere assertion by petitioners of a claim for relief upon a Federal ground, which has been determined adversely, does not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction, except for the claim based on Federal constitution or statute.

In the case before the Court petitioners asserted two independent causes of action. Primarily, jurisdiction was invoked on diversity of citizenship for the violation of certain alleged rights not founded on Federal statute or constitution, and, secondly, they allege interference with interstate commerce with the apparent right to sue under the Federal Anti-Trust Statute. They asserted a third claim based upon alleged violation of constitutional rights but which proved so unsubstantial that petitioners saw fit to stand on the first two.

In all the cases cited by petitioners to sustain their contention, in substance, that a jurisdiction once acquired extends to all questions in a case, cited and flowing from the principle laid down in *Siler* v. *Louisville National R. R. Co.,*

213 U. S. 175, there is not one principle announced that is out of harmony with the learned reasoning of the Circuit Court of Appeals and the position it takes in deciding the point.

It would be wasting the time of this Court to go into a discussion of the cases cited in the learned Court's opinion. All cases applicable to the situation and those claimed in conflict with its opinion have thoroughly been discussed and harmonized.

The Circuit Court of Appeals properly ruled that the mere assertion of a claim for relief upon a Federal ground, which has been determined adversely, did not give jurisdiction to the District Court to pass upon questions of which it would have no jurisdiction, except for the claim based on Federal Constitution or Statute.

We submit that the decision of the Circuit Court of Appeals is clearly correct and respectfully urge that the petition for the writ of certiorari be denied.

Respectfully submitted,

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Of counsel:

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